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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.11.2007

CORAM

THE HONOURABLE MR.JUSTICE V.DHANAPALAN

A.S.No.57 OF 1993

Subramaniam ... Appellant/1st Defendant

vs.

1. Subbulakshmi
2. Lakshmi
3. Parvathy
4. Kuppammal
5. Palaniammal ... Respondents/Plaintiffs & Defendants 2 to 5

Appeal filed under Section 96 of the Code of Civil Procedure against the judgment and decree dated 14.09.1992 made in O.S.No.227 of 1986 on the file of the Subordinate Court, Namakkal.

For Appellant : Mr.T.R.Rajaraman

For Respondent-1 : Mr.D.Sivakumar

J U D G M E N T

The first defendant in the suit has preferred this appeal against the judgment and decree of the Subordinate Court, Namakkal made in O.S.No.227 of 1986, dated 14.09.1992, in and by which, a decree is granted declaring that the plaintiff is entitled to one-third share of the suit schedule property.

2. Brief facts leading to the filing of the appeal, in a nutshell, are as under:

(i) One Subbaraya Chetty had two wives. Through his first wife, he had only one son, by name, Nanjayya Chettiar. After the death of his first wife, he married one Muthammal and through her, he had three sons, namely, Palani Chettiar, Komaravel Chettiar and Ardanari Chettiar. The plaintiff is the only daughter of the said Palani Chettiar through his wife, Meenakshi Ammal. It is the case of the plaintiff that Palani Chettiar died in the year 1951 and Meenakshi Ammal died in the year 1979; Komaravel Chettiar died in the year 1973 and his wife died in the year 1977, leaving behind defendants 1 to 4 as their legal heirs;

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Ardanari Chettiar died in the year 1982 and the 5th defendant is his wife.

(ii) It is the further case of the plaintiff that in a partition between Muthammal, the second wife of Subbaraya Chettiar and her sons Palani Chettiar, Komaravel Chettiar and Ardanari Chettiar along with Nanjayya Chettiar, the only son of the first wife of Subbaraya Chettiar, the properties were allotted to the said Muthammal and her sons in 'C' and 'B' schedule properties. The 'A' schedule property was allotted to the said Nanjayya Chettiar, which is not the subject matter of the suit. The plaintiff is the sole heir of Palani Chettiar and Meenakshi Ammal and is entitled to a 1/3rd share in the schedule mentioned property. The 'A' schedule property described in the suit is the 'B' schedule property attached to the partition deed dated 27.04.1926, since Ardanari Chettiar, the paternal uncle of the plaintiff sold his share to his wife Palaniammal, the 5th defendant under a registered sale deed dated 06.05.1948 and the said Palaniammal is entitled to 1/3rd share in the said 'A' schedule property. So also the defendants 1 to 4 are together entitled to the remaining 1/3rd share in the 'A' schedule property as the heirs of Komaravel Chettiar and his wife. The 'B' schedule property, which was described as 'C' schedule property in the partition deed dated 27.04.1926 was allotted to Muthammal, the paternal grandmother of the plaintiff in lieu of her maintenance. Since Muthammal died in the year 1959 or 1960, the plaintiff, as the sole heir of Palani Chettiar is entitled to 1/3rd share; defendants 1 to 4 as the legal heirs of Komaravel Chettiar are entitled to 1/3rd share and the fifth defendant Palaniammal as the heir of Ardanari Chettiar is entitled to the remaining 1/3rd share in the 'B' schedule property.

(iii) According to the plaintiff, the cause of action for the suit arose on 10.04.1986, when the first defendant sent a caveat petition dated 09.04.1986 to the plaintiff through his Advocate. Even after the execution of the partition deed on 27.04.1926, the suit properties were not divided among the three brothers, viz., Palani Chettiar, Komaravel Chettiar and Ardanari Chettiar. The plaintiff and the defendants as their legal representatives have been in possession and enjoyment of the said properties in common. The first defendant was authorised to receive rent from the house and has been receiving the rent and paying the taxes and carrying out repairs then and there on behalf of all the shares. Since the first defendant exhibited his hostile attitude towards the plaintiff by filing a caveat petition, the plaintiff was constrained to file a suit in O.S.No.227 of 1986 praying to pass a preliminary decree for the partition of the suit 'A' and 'B' Schedule properties taking into consideration all aspects for the convenient enjoyment of the property into three equal shares and allot one share to the

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plaintiff, permitting the plaintiff to file a petition for final decree for partition (2) directing the first defendant to pay the cost of the suit to the plaintiff.

(iv) The first defendant filed a written statement stating that the claim of the plaintiff is not factually and legally sustainable. According to the first defendant, the dates of death of Palani Chettiar and Komaravel Chettiar given in the plaint are incorrect and that the plaintiff has not filed the genealogy of her family members before the Court. However, the first defendant has admitted that the properties mentioned in the plaint schedule are as per the partition deed dated 27.04.1926. The specific allegation of the first defendant is that Palani Chettiar, before his death executed a Will dated 28.11.1951, bequeathing his property in favour of the first defendant. Further, the first defendant denied the averments in paragraph 5 of the plaint, stating that the fifth defendant is not entitled to any share in the property and that Ardanari Chettiar and his wife Palaniammal have deposited a sum of Rs.20,000/- on their grandsons and they are deriving interest from it. According to the first defendant, he is in possession and enjoyment of the suit property and as per the partition deed, dated 27.04.1926, 'B' schedule property is described as 'A' schedule in the suit and that the plaintiff cannot claim any right over the 'A' schedule property. Similarly, 'B' schedule property is shown as 'C' schedule in the plaint schedule property. The first defendant also denied the year of death of Muthammal as stated in the plaint and stated that Muthammal died only in the year 1964. As per the partition deed dated 27.04.1926, Muthammal was not at all enjoying any property independently and it is only Komaravel Chettiar, who has been given the right by their family members to maintain her till her death. Komaravel Chettiar on his own right paid Municipality Tax, collected rents and after his death in the year 1978, the first defendant is in possession of the property on behalf of defendants 2 to 4. Therefore, according to the first defendant, there is no legal right for the plaintiff to claim any share in the plaint schedule property.

(v) The plaintiff had filed a reply statement denying the allegations in paragraph 4 of the written statement of the first defendant that even before his death, Palani Chettiar executed a Will dated 28.11.1951 in favour of the first defendant. She contended that the alleged will dated 28.11.1951 produced before the Court is only a forged document created for the purpose of making unlawful claims. According to the plaintiff, her father Palani Chettiar did not intend to execute any Will and he did not execute any Will till his death, much less in favour of the first defendant. In fact, dissatisfied with the behaviour of the first defendant, Palani Chettiar had expressed on so many occasions that the first defendant was an undesirable person. The

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plaintiff contended that the signature in the alleged Will is not that of her father Palani Chettiar and that the alleged attestors and the scribe have not signed in the alleged Will dated 28.11.1951 relied upon by the first defendant.

(vi) Thereafter, the first defendant had filed an additional written statement stating that the property of the plaintiff's mother was situated at Door No.3 to the north of the suit property at Door Nos.4 and 5. The plaintiff is the only legal heir of Palani Chettiar and though she was visiting the suit property often for the past 40 years, she did not claim any share in the suit property during the lifetime of the defendants' father and paternal uncles. Since 1953, the first defendant as well as his father Komaravel Chettiar have constructed a house at Door No.5 much to the knowledge of the plaintiff and they are in possession of the property for more than 40 years and therefore, the plaintiff cannot make any claim as barred from the plea of ouster.

(vii) An additional reply statement has been filed by the plaintiff denying the allegations that after the death of Komaravel Chettiar, the defendants were in possession and enjoyment of the suit properties and were paying the tax in their own right. The plaintiff has specifically stated in paragraph 9 of the plaint that the first defendant was authorised to receive the rent and he was paying the taxes and carrying out repairs on behalf of all the shares and the first defendant has also specifically admitted the same in the cross-examination saying that "*தன் தகப்பனார் பாதுகாப்பிலும் தன் பாதுகாப்பிலும் இருந்து வருவதால் நாங்கள் வரி கட்டினோம் ...*". The plaintiff also denied the allegations in the additional written statement that there was ouster at any point of time of the plaintiff by the defendants or their predecessors in title and that in 1953 in Door No.5, a construction was put up by her and her father. She stated that even long before, a small house was put up for Muthammal by all her three sons in the 'C' schedule property attached to the partition deed.

(viii) The Trial Court on consideration of the facts and circumstances and the oral and documentary evidence has decreed the suit in favour of the plaintiff, holding that the plaintiff is entitled to one-third share of the suit property and permitted the plaintiff to file a petition for final decree of partition with costs to be borne by the respective parties.

Aggrieved by the judgment and decree of the Trial Court, the first defendant has preferred the present appeal.

3. Heard Mr.T.R.Rajaraman, learned counsel for the appellant and Mr.D.Sivakumar, learned counsel for the respondents.

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4. Learned counsel for the appellant/first defendant has contended that the Trial Court has failed to see that the appellant/first defendant has been in exclusive possession and enjoyment of the suit property to the knowledge of the plaintiff and her predecessor for more than 40 years. Therefore, the first respondent/plaintiff who had lost her title by adverse possession and ouster cannot claim any share in the suit property. Learned counsel further submitted that Ex.B5-Settlement Deed executed by Komaravel Chettiar in favour of the appellant/first defendant clearly establishes that the appellant/first respondent's father was enjoying the 'A' schedule property as an absolute owner and despite the same, the Trial Court has not given due consideration to the Settlement Deed. He contended that the fact that the first respondent/plaintiff did not claim any share through her mother will show that the first respondent/plaintiff's mother who was entitled to 1/3rd share in the suit 'A' schedule property after the death of her husband never claimed any right in the suit 'A' schedule property and the learned Subordinate Judge ought to have held that the appellant/first defendant who was in exclusive possession and enjoyment had perfected his title by adverse possession.

5. Learned counsel for the appellant/first defendant further contended that after the Hindu Succession Act, 1956, the suit 'B' schedule property would become the absolute property of Muthammal, since she had allowed the appellant/first defendant's father to construct a house in the said property for his own and that the learned Subordinate Judge ought to have held that the first respondent/plaintiff is not entitled to any share in the suit 'B' schedule property. According to the learned counsel, the learned Subordinate Judge had failed to see that the said Pazhaniammal is the plaintiff's aunt and the appellant/first defendant's admission that Pazhaniammal is living in a portion of the suit 'B' schedule property will not support the case of the first respondent/plaintiff in any manner. He further contended that three ingredients are necessary to prove the ouster, namely,

(i) declaration of hostile Omissus.
(ii) long and uninterrupted possession.
(iii) exercise the right of exclusive ownership openly to the knowledge of the other co-owners

6. Learned counsel for the appellant/first defendant has placed reliance on a decision of this Court reported in 94 L.W. 106 in the case of R.Veerappan vs. Shanmugavelu, the relevant portion of which is extracted hereunder:

> "3. The Trial Court overlooked the fundamental issue, viz., 'Is the Civil Court's jurisdiction to

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> determine whether the site is a 'kudiyiruppu' and whether the appellant is an agriculturist or an agricultural labourer, barred under the Act despite the specific averment in paragraph 6 of the written statement 'The plaintiff cannot invoke the jurisdiction of this Court for any purpose'. It is true such a defence as to ouster of civil court's jurisdiction was not raised in the grounds of appeal before the lower appellate Court; but then the appeal, A.S.No.48 of 1976, being a continuation of the suit, the lower appellate Court ought to have taken cognizance of the vital issue as to its jurisdiction and render its finding thereon. As a matter of fact, in the course of its judgment the lower appellate Court did briefly set out the defence in the written statement; nonetheless it had overlooked the vital points for determination. Let me reiterate that it is the primary duty of the first Appellate Court to take note of all the issues, arising out of the pleadings, notwithstanding that in the grounds of appeal the particular point was not adverted to, so long as there is no indication that the particular point was not pressed and furthermore the general assertion that the judgment and decree of the court below is erroneous, finds a place in the grounds of appeal. There is nothing in the records to indicate that the issues relating to ouster of civil court's jurisdiction were even given up. It might be that the learned counsel for the appellant in the lower appellate court is equally to be blamed, but that will not absolve the first appellate Court of its duty to notice the issues arising out of the pleadings and to render its findings thereon."

7. On the other hand, learned counsel for the respondents has strenuously contended that the signature of Palani Chettiar in the Will and that of his signature in the Sale Deed is not similar and therefore the Will is not genuine. He has further contended that during the period of trial, the attestors were not alive and though the scribe was alive, he was not called upon to depose and no efforts were taken by the appellant/first defendant to prove the Will. According to the learned counsel, at least the children of Palani Chettiar ought to have been examined as secondary evidence to prove the signature in the Will.

8. Learned counsel for the respondents further submitted that the Trial Court, on giving due consideration to the pleadings and the evidences adduced has given a convincing reason to decree the suit. Therefore, there is no material or clinching evidence to interfere with the findings of the Trial Court. He

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contended that in order to prove the plea of ouster, there is no suggestion on any of the ingredients as contended by the learned counsel for the appellant/first respondent. It is also the strong contention of the learned counsel for the respondents that the appellant/first defendant has also specifically admitted in his cross-examination in the following words, "*தன் பாட்டி இறக்கும்வரை தன் தகப்பனார் பராமரிப்பிலேயே இருந்து வந்ததாகவும் கூறகிறார்ங*" that his grandmother was maintained by his father till her death. Therefore, according to the learned counsel, there is no reason to interfere with the findings of the Trial Court and that the appeal may be dismissed.

9. To support his contentions, learned counsel for the respondents has relied on a judgment reported in AIR 2005 Madras 193 in the case of L.H.Vidyapoornam vs. L.H.Premavathy and others, the relevant portion of which is extracted as under:

> "18. Similarly, the next contention put forth by the defendants to the effect that the plaintiff is not entitled to maintain he suit as she was not in joint possession of any of the property mentioned in the plaint schedules can have no bearing on the issue for the simple reason that even as per the admitted case of the defendants, the father Harikrishnan died intestate leaving behind his self-acquired property, namely, item No.1 to the plaint 'A' schedule and therefore it follows that the plaintiff should be presumed to have been in joint possession of the said item till the property is divided by metes and bounds in accordance with the rights of the parties entitled to succeed to the property. In any view of the matter, since the plaintiff claims a share in all the items of the schedule mentioned properties dehors the alleged Will dated 30.10.1986 executed by Kamalammal, she should be presumed notionally that she has been in possession and enjoyment of the joint family properties along with other members. For the reasons stated above, we are of the opinion that the contention of the defendants that the suit is not maintainable cannot be countenanced. Hence, the issue is found in favour of the plaintiff.
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> 26. Though the learned counsel for the 5th defendant would rely upon the decision, S.Sundaresa pai vs. Sumangala T.Pai, AIR 2002 SC 317 that even if some of the heirs are excluded in the legacy under the Will, it is not a suspicious circumstance. However, the facts involved in the said case are such that the ratio laid down therein cannot be made applicable to the case on hand for the simple reason that the Will in question in that case, had been

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proved to have been executed by the testator in a sound and disposing state of mind and the only question involved therein was about the uneven distribution of assets among the children which by itself held to be not a suspicious circumstance surrounding the execution of the Will. On the contrary, in this case, the daughters of Kamalammal are not getting any share in the immovable properties, namely, item Nos.2 to 4 to plaint 'A' schedule and also in the jewels left by Kamalammal, only the three sons were bequeathed with immovable properties and 2/3rd share in the jewels to the girl child of the 5th defendant to the exclusion of other heirs. It is in these circumstances, we are constrained to hold that the ratio laid down in the said decision does not advance the case of the 5th defendant in any manner. It follows necessarily that even the bequeath under Will Ex.B1 creates the strong suspicion which has not been dispelled by the 5th defendant as narrated above.

29. Thus, we record a finding that the said Will dated 30.10.1986 is not executed by Kamalammal in a sound and disposing state of mind as claimed by the appellant herein, that therefore, the testamentary disposition made under the Will regarding the suit item Nos.2 to 4 to the plaint 'A' schedule is not true and valid and that consequently, the 5th defendant is not entitled to any letters of administration in respect of the said Will."

10. I have carefully analysed the pleadings, oral and documentary evidences and given due consideration to the submissions made by the learned counsel on either side.

11. The relationship between the parties is not in dispute. It is an admitted fact that one Subbaraya Chettiar through his first wife had a son by name, Nanjayya Chettiar and after the death of his first wife, married one Muthammal and had three sons through her, namely, Palani Chettiar, Komaravel Chettiar and Ardanari Chettiar. The plaintiff is the daughter of Palani Chettiar; defendants 1 to 4 are the son and daughters of Komaravel Chettiar and the fifth defendant is the wife of Ardanari Chettiar. It is seen that in the year 1926, a partition deed was executed, partitioning the property into three shares, among Nanjayya Chettiar, Muthammal and her three sons. The partition deed, dated 27.04.1966 is marked as Ex.A1. The 'A' schedule property allotted to Nanjayya Chettiar is not connected to the suit property and the same is not in dispute. The Sale Deed dated 06.05.1948 executed by Ardanari Chettiar in favour of

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the fifth respondent Palaniammal is marked as Ex.A2. The first respondent/plaintiff is the only legal heir of Palani Chettiar.

12. The appellant/first defendant in his evidence has deposed that the 5th item of the 'C' schedule property has been allotted to his grandmother, Muthammal and that his father had constructed a house in the said property. It is the case of the appellant/first defendant that the plaintiff's father had shown love and affection to him, since the former had no male heir and had executed a Will in his favour. But, the same has been denied by the first respondent/plaintiff that no Will has been executed by her father in favour of the appellant/first defendant. The first respondent/plaintiff has also denied the averments that the appellant/first defendant and his father had been in possession and enjoyment of the entire property and that the payment of rent as well as the taxes made by the appellant/first defendant is on behalf of all the sharers. The sale deed dated 21.06.1946, executed in favour of the first respondent/plaintiff's mother is marked as Ex.A3, wherein, the first respondent/plaintiff's father, Palani Chettiar has signed and attested. Therefore, on comparison of the signature of Palani Chettiar in Ex.A3-Sale Deed and the Will, it is clear that they are not similar and the same is disputed by the first respondent/plaintiff. In this regard, one Annamalai, who has been examined as P.W.2 has deposed that he attested Ex.A3-Sale Deed and that he knows the signature of Palani Chettiar. The existence of Ex.A3-Sale Deed was not disputed by the appellant/first defendant.

13. The appellant/first defendant, who was examined as D.W.1, in his evidence has deposed that Ex.A3-Sale Deed itself shows that the 5th item of the 'C' schedule property has been allotted to his grandmother as maintenance and his father had constructed a portion in it and that his grandmother Muthammal had been living in that portion till her death and that they did not have any objection to permit her to live in that place. He has also deposed that a Settlement Deed, marked as Ex.B5 has been executed by his father in his favour and an unregistered Will, marked as Ex.B6 has been executed by the plaintiff's father Palani Chettiar in his favour. He has further deposed that his neighbours have signed as attestors in the Will, but they are not alive and that the scribe to the Will is alive. However, he has not taken any steps to examine the scribe as a witness to prove the Will as genuine or not and also no efforts were taken by him to compare the signature of Palani Chettiar by examining any witness and to get any expert opinion about the genuineness of the Will. It is specifically denied by the first respondent/plaintiff that no Will was made by her father in favour of the appellant/first defendant and in the absence of any proof, the Will cannot be accepted and the claim made by the appellant/first defendant has to be rejected.

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14. The first point that arises for consideration is whether the appellant/first defendant has proved his claim in respect of adverse possession. From the deposition of D.W.1, the appellant/first defendant, it is seen that the appellant/first defendant's father had paid taxes in respect of Door Nos.4 and 5 of the suit property on behalf of all the shares and had been in possession of the same along with others. It is further seen that there was no partition among the brothers of his father, since his grandmother was alive and that they have paid the taxes and there is no record that the taxes were paid only by the appellant/first defendant's father alone. It was also admitted by the appellant/first defendant that his grandmother was living in the house constructed in the suit property and that they had no objection for the same. In respect of the claim made by the appellant/first respondent, Exs.B8 to B54 are marked as House Tax Receipts for Door No.5 from 01.06.1967 to 1992; in respect of Door No.4, Exs.B55 to B119 were marked for the period 1968 to 1992; Exs.B120 to B185 are marked as Electricity charges receipts for SC.No.D.382 for the period 1982 to 1992; Ex.186 dated 10.11.1985 is the Patta issued in favour of Komaravel Chettiar; Exs.B187 and B188 are the Property Tax Books for Door No.5 from 1987 to 1992, but the first respondent/plaintiff denied that these receipts are not-paid on her behalf.

15. Though, according to the appellant/first defendant, the first respondent/plaintiff has claimed adverse possession of the suit property, his deposition clearly reveals that he has not made any efforts to get any document in his favour from his grandmother Muthammal and Exs.B187 and B188 are documents marked after the filing of the suit and therefore these documents cannot be taken into account. The appellant/first defendant in his deposition has clearly admitted that there was no partition between his father and his brothers and from the available evidence, it is seen that the appellant/first defendant has not made out any case in respect of adverse possession of the property.

16. The next point that arises for consideration is that whether the claim made by the appellant/first defendant over the Will in Ex.B6, dated 28.11.1951 is genuine or not. The appellant/first defendant has himself admitted that his neighbours have signed as attestors in the Will, but they were alive at the time of trial. However, he made a specific admission that the scribe to the Will was alive during the trial. In spite of admitting the existence of the scribe to the Will, the appellant/first defendant has not taken any efforts to examine him before the Court, in order to prove the genuineness of the Will. It is a settled proposition of law that when the question of genuineness of a document arises, it is the duty of

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the person who claims the benefit of the document to prove its genuineness with specific pleadings and evidence. Applying the said proposition to the case on hand, it is clear that the appellant/first defendant has failed to prove the genuineness of the Will by non-examining the scribe to the Will and by not taking any efforts to compare the signature of Palani Chettiar in the Will with other documents. In the absence of any legal inference to support the Will-ExB6, the appellant/first defendant cannot claim any share in the suit property and thereby his claim over the suit property is denied.

17. The last point that arises for consideration is whether the appellant/first defendant and his father had 40 years of possession of the property in question. It is seen that the Trial Court has not framed any issues in respect of the possession of the property to substantiate the efforts made by the learned counsel for the appellant/first defendant that they were in possession of the property for over 40 years with the knowledge of the co-owners. Therefore, there is an ouster. In order to prove that, the following three ingredients as stated by the learned counsel for the appellant/first defendant are necessary :

(i) declaration of hostile Omissus.
(ii) long and uninterrupted possession.
(iii) exercise the right of exclusive ownership openly to the knowledge of the other co-owners

18. The deposition of D.W.1 and the material evidence would show that the appellant/first defendant on his behalf and on behalf of other sharers had been in possession of the property along with others and he had paid the necessary taxes and collected rent and maintained the suit property. Therefore, it is clear that it is not only the appellant/first defendant and his father, who had been in possession of the suit property for more than 40 years but they had been in possession of the same along with other co-owners. Considering all these aspects, more particularly the issue in respect of possession of the suit property, the Trial Court decreed the suit in favour of the first respondent/plaintiff holding that she is entitled to one-third share of the property in question.

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19. In view of the foregoing discussion, this Court finds no ground available to interfere with the findings of the Trial Court. Therefore, in the absence of any material evidence produced by the appellant/first defendant to substantiate his claim, I find no merits in this appeal and accordingly, the appeal is dismissed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1.The Subordinate Judge, Namakkal.

2. -do- thro' the Principal District Judge, Namakkal.

3.The Record Keeper, V.R.Section, High Court, Madras.

One cc to Mr.D.Shivakumaran, advocate SR.No.66709

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